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Lawfulness and the Perception of Legal Salience

Claudio Michelon

The ability to identify all (and only the) legally salient properties within a complex situation is a subjective trait necessarily possessed by a lawful person. This ability is better explained as a type perception. The paper puts forward an account of the perception of legally salient properties in which perception (i) affords a preliminary ordering of the total information received (ii) while allowing for the formation of a remainder that explains the peripheral legal perception experienced legal practitioners develop over time. After this account of legal perception is in place, the paper considers the relationship between this aspect of subjectivity and complete virtue, in particular, practical wisdom and lawfulness.

Lawfulness, Practical Wisdom, Perception, Legal Argumentation

1. Practical perception and legal salience

Reasoning about what is legally required or permitted in a particular situation is predicated on the identification of the legally salient properties within that situation. The identification of the legally salient properties (hereinafter LSPs) in a concrete situation is a complex activity that combines different processes, including a preliminary ordering of the situation's properties (singling out properties that are *prima facie* legally relevant) and the scrutiny of those initially identified properties by the production of sound and relevant legal arguments. Given the importance of the initial identification of legally salient properties in legal argumentation, it is remarkable that the available philosophical accounts of legal argumentation shed so little light on it.

In relation to the initial identification of LSPs, some explanations straddle the line between the methodological and the ethical by offering very thin prudential advice on

how to search for them,¹ while others are happy to consign the question either to the realm of the inscrutable (as intuitionism does),² or to outsource the problem to empirical research.³ Yet, neither of those alternatives is sufficient from the point of view of (*inter alia*) a virtue-theoretical justification of the practice of legal argumentation in the context of legal decision-making. One such justification necessitates a clearer account of the connection between (i) the initial identification of LSPs and (ii) the relevant reasons for action than the one provided by prudential, intuitionist, and empirical accounts. Sections two and three of the paper present an account of this connection by developing the general idea of practical perception and adapting it, when necessary, to legal contexts.

This account is meant to throw light on two related phenomena: (i) an agent's capacity to identify in a particular situation the properties that are included in the antecedent of the relevant legal rule *before the deployment of the relevant legal reasons* (the focus of section two), and (ii) an agent's capacity to identify *prima facie* legally salient properties that *do not correspond to any legal rules which the agent has explicitly learned* (the focus of section three). Accordingly, the paper presents an explanation of how perception is able to single out certain features of a more complex

¹ Some accounts present a method consisting of a series of steps as a way to increase the probability of (or perhaps guarantee) success in identifying the LSPs. See Neil MacCormick, *Rhetoric and the Rule of Law* (Oxford University Press, 2005), 84ff and Klaus Günther, *The Sense of Appropriateness* (State University of New York Press, 1993), *passim*, specially 229-239 and 203. Although such steps have prudential value, they fall short of a satisfactory account of LSP identification (as I argued in Michelon, 2006).

² For intuitionism, the detection of evaluative properties springs from an unanalyzable sensitivity to such properties. It has been rightly criticized for making the subjective insight inscrutable and for, as McDowell put it, turning the epistemology of value into mere mystification". See John McDowell, *Mind, Value, and Reality* (Harvard University Press, 1998), 132.

³ Some legal theorists place the identification of LSPs within the realm of 'hunches', whose vindication is given by a suitable legal justification, as eg Richard Wasserstrom, *The Judicial Decision* (Stanford University Press, 1961), 25-30 and 65-66. This view does not necessarily stem from intuitionism, as there are reasons other than a commitment to intuitionism that might justify a lack of philosophical interest in the investigation of the hunch.

situation. Although this explanation would go a long way towards *justifying* the reliance on perception as an appropriate way to identify LSPs, the paper does provide a complete justification for such reliance.

Perception is, of course, a subjective attribute and virtue theory's core business is to investigate how an agent's subjectivity bears on her capacity to handle *inter alia* moral, legal, and epistemic normativity. In fact, perception is often said to be an integral part of at least certain virtues. Although legal theorists have tapped into virtue theory's resources to try and clarify the relationship between legal normativity, agency, and character traits, not much light has been shed on how the perceptive aspect of virtue might help identifying LSPs.

Much of the discussion on the relevance of a virtue-theoretical approach to legal decision-making focuses on the bigger picture. Is there a role for intellectual and/or moral virtues in legal reasoning? If so, which moral virtues are relevant? Is it lawfulness⁴ or an aspect thereof (perhaps equity),⁵ practical wisdom,⁶ or perhaps a division of labour between different aspects of the subjectivity of the virtuous agent. But virtues, habits and other complex subjective traits are bundles of personal traits which include complex motivational elements (like dispositions to act and feel) and

⁴ I use 'Lawfulness' to refer to Aristotle's "General (or Legal) Justice". As Kraut put it, justice in this sense, "is the intellectual and emotional skill one needs in order to do one's part in bringing it about that one's community possesses ... [a] stable system of rules and laws". See Richard Kraut, *Aristotle* (Oxford University Press, 2002), 106. For a further development of the idea in relation to contemporary legal systems, see Lawrence Solum 'Natural Justice' 51 (2006) *American Journal of Jurisprudence* 65, at 85-91

⁵ I use 'Equity' to refer to the capacity to identify when exceptions to *prima facie* applicable rules are in order, ie Aristotle's *epieikeia*. For an excellent account of *epieikeia* in the Aristotelian *corpus* see Christoph Horn, 'Epieikeia: The Competence of the Perfectly Just Person in Aristotle' in: Burkhard Reis and Stella Haffmans (eds), *The Virtuous Life in Greek Ethics* (Cambridge University Press, 2006) 142-166.

⁶ Amalia Amaya has recently articulated three related axes along which the literature on practical wisdom and legal reasoning has developed in recent years. Practical wisdom has been said to bear on legal reasoning (i) for its potential to help agents deal with particularity; (ii) as a form of perception and (iii) for bringing to light its emotive aspects. Each of those aspects of practical wisdom has a bearing on the agent's capacity to describe appropriately the situation. ('Virtue and reason in Law' in Maksymilian Del Mar (ed), *New Waves in Philosophy of Law* (Palgrave MacMillan, 2011) 123-144.

epistemic capacities (such as practical perception and the ability to produce and evaluate reasons). In the virtuous character, such traits might well be inseparable. But directing our gaze to specific aspects of virtue and to the role they play in legal decision-making allows for a more focused discussion of the larger questions. Hence this paper's focus on perception and, specifically, on the role it plays in identifying LSPs.

There can be little doubt that perception is an integral part of virtues in general and, in particular, of the intellectual virtue of practical wisdom.⁷ Perception has also been said to be a crucial part of legal reasoning.⁸ It looks like a good place to start.

An initial focus on the role of perception (instead of complete virtue) in the identification of LSPs has yet another advantage. It is not immediately clear that virtues such as lawfulness, equity, and practical wisdom have much explanatory power regarding the actions of contemporary lawyers and judges. Moreover, one does not have to be as skeptical as MacIntyre about the moral qualities of contemporary lawyers⁹ to accept the claim that good lawyers are not necessarily more just, more equitable, or practically wiser than anyone else, while also accepting that they possess a more developed capacity to identify the LSPs in concrete situations. Concentrating

⁷ Perhaps the first (certainly the most influential early) statement of the role of perception in virtue comes from Aristotle's *Nicomachean Ethics* at 1142a23-30. It is not clear what Aristotle means by "perception", but he does not have only the passive reception of data streams in mind (see, for instance, C.D.C. Reeve, *Practices of Reason* (Oxford University Press, 1992), 67-73).

⁸ See Amalia Amaya 'The role of virtue in legal justification' in: Amalia Amaya and Ho Hock Lai (eds), *Law, Virtue, and Justice* (Hart, 2012), 62-64; see also Amalia Amaya (n 6) 128-130.

⁹ For MacIntyre, the activity of a legal practitioner is one of the clearest examples of the fragmentation of the moral life that takes place in modernity (fragmentation that is even more perceptible in the experience of a citizen who tries to understand the juridical implications of her actions). In his words "[o]urs is a culture dominated by experts, experts who profess to assist the rest of us, but who instead make us their victims. Among those experts by whom we are often victimized the most notable are perhaps the lawyers" (Alasdair MacIntyre, 'Theories of natural law in advanced modernity' in *Common truths: New Perspectives on Natural Law*, E.B. Mclean (ed) (ISI Books, 2000), 91-118. See also Alasdair MacIntyre *Ethics and Politics: selected essays volume 2* (Cambridge University Press, 2006), 198.

on perception leaves open the question as to whether or not this legal perception can be developed (at least up to a point) in a way that is not dependent on the simultaneous development of other aspects of the relevant virtue. That is not to say that the account of legal perception put forward below cannot be integrated into an account of legal argumentation that is predicated on full-blown virtue. In fact, the picture of perception presented below is vindicated by its potential to contribute to a more nuanced conception of how legal argumentation could be integrated into normative arguments stemming from virtue ethics. In section 4 below I map out the roles that might be performed by this subjective trait in a complete account of lawfulness as a moral virtue.

2. Sorting normative properties through perception

Perception of normative properties is sometimes taken not to be a form of perception at all, but a metaphor for a particular kind of engagement of reasons for action. In his discussion of McDowell's claim that moral perception has to do with a form of "sensitivity to reasons",¹⁰ Jacobson argues that "McDowell's own talk of moral perception must ... be taken metaphorically".¹¹ Yet, there is nothing immediately problematic in the idea of perceiving properties of a complex situation as normative.

A working conception of practical perception starts by the identification of its object. What is being perceived by the agent who successfully engages her practical perception? Moral perception is concerned with making *discriminations*, that is to

¹⁰ McDowell (n 2) 132.

¹¹ See Daniel Jacobson, 'Seeing by Feeling: Virtues, Skills, and Moral Perception' (2005) 8 *Ethical Theory and Moral Practice* 387, at 388). Jacobson is (understandably) worried that excessive reliance on the moral perception might result in a moral theory with the same epistemic shortcomings possessed by intuitionism. For reasons presented below, I do not think that reliance on perception commits a theory to any form of intuitionism.

say, with “noting a morally significant feature of the situation”.¹² A similar point can be made about legal perception, whose object is discriminating the legally significant features of the situation. Now, not everything that can be said about moral perception can also be said about legal perception. If Blum is correct about moral perception, the features of a situation recognized as having moral significance create a justificatory burden in the moral agent, as they “must be taken into account in constructing a principle fully adequate to handle the situation”.¹³ It is not entirely clear that this is true regarding moral perception, but it is certainly not true regarding law. The question of whether or not a property of a particular situation is *actually* legally relevant is in no way settled by the agent’s perceptive framework: it is settled by sound legal arguments.¹⁴ What they do have in common, as remarked above, is that they allow the subject to make discriminations between discrete properties found within a situation on the basis of a form of sensitivity to the relevant reasons.

If practical perception (moral, legal, prudential, etc) is a kind of sensitivity to reasons, it cannot be a purely passive subjective trait. This is something practical perception shares with sense perception: neither is reducible to the gathering by the senses of raw data streams. When practical perception is engaged in the search for salient properties, what it produces is the perception of something *qua* something. In other words, as part of the production of practical arguments, practical perception is always conceptual: it is the perception of an object x possessing a property F . It is always predicated on the possession by the perceiving subject of concepts of x and F , and on the fact that she deploys those concepts in the experience. It is important to note that

¹² See Lawrence Blum, *Moral Perception and Particularity* (Cambridge University Press, 1994), 35. Blum believes that is not all there is to moral perception, which would also include the ability to weigh adequately those features.

¹³ See Blum (n 12) 40-41.

¹⁴ See, *inter alia*, Amalia Amaya (n 6)129.

not all forms of perception (including forms of practical perception) are conceptual. But the preliminary sorting carried out by practical perception *to identify LSPs in the context of legal argumentation* is necessarily conceptual.

This preliminary sorting carried out by legal perception (and other forms of practical perception) can be corrected by reasoning. The search for the relevant legal arguments might show that properties identified as legally salient turn out not to be answer-driving legal properties. Reasoning might also reveal the need to rethink the legal relevance of properties that are not singled out by perception as legally salient. The preliminary conceptual ordering produced by the senses is not the final stage of rational ordering.

Aquinas's theory of the 'inner senses', which I described in more detail elsewhere,¹⁵ describes the division of labour between different aspects of perception while it carries out this ordering job. Aquinas believes that there are four inner senses that, together, organise data streams into *discrete units (gestalts)*.¹⁶ Although the units identified by the perceiving subject will vary from one subject to another (and even beyond the realm of agents, given that non-human animals might also possess the inner senses) the operation of the inner senses is identical.¹⁷ So when a lamb looks at the wolf it sees more than simply localized shades of grey: it sees a *wolf* and it sees a *source of danger*. The inner senses are separated into four, by the combination of two criteria: whether it deals with non-evaluative properties (like being 'a wolf') or evaluative properties (like being 'a source of danger'); whether its job is the deployment of a previously acquired gestalt to 'read' what is perceived by the exterior senses or else to the storage of such gestalts within the subject's perceptual

¹⁵ (Michelon 2012)

¹⁶ What follows is a sketch of the relatively brief discussion in *Summa Theologiae* 1a, question 78, article 4. See Aquinas, *Summa Theologiae* (Blackfriars, 1970), Vol XI.

¹⁷ Herbert McCabe, *On Aquinas* (Burns and Oats, 2008), 123–27.

framework. This division is important, because the gestalts can change (both by addition, subtraction, or revision) through the subject's experiences. In the resulting picture, the *sensus communis* deploys non-evaluative gestalts, while the *imaginatio* stores such non-evaluative properties; the *aestimativus* deploys value-laden gestalts (an object might be perceived 'as valuable' or 'as dangerous') while the remaining inner sense (unnamed by Aquinas, but christened *sense-memory* by McCabe) is in charge of storing such evaluative properties.

This picture explains how perception can be understood as conceptually 'loaded', ie, as producing an ordering both in terms of perceiving objects and in terms of perceiving an object's evaluative and non-evaluative properties. It is important to make clear that accepting that perception can perform this ordering function does not commit one to perceptual conceptualism, that is to say, to the thesis according to which:

for any object *x* and any property *F*, a subject has an experience as of *x* being *F* only if she has concepts of *x* and *F*, and deploys those concepts in the experience.¹⁸

Accepting that perception is capable of organizing sense data into conceptual frameworks is not the same as accepting that perception *only happens* through the possession and the deployment of concepts. In fact, the possibility of non-conceptual perceptions (ie perceptions that do not meet the conditions of possession and deployment of concepts) enhances the explanatory power of the idea (to be introduced shortly) of "legal peripheral perception". An example regarding the perception of

¹⁸ Susanna Siegel, 'The Contents of Perception' in Edward Zalta (ed) *The Stanford Encyclopedia of Philosophy* (2015) *The Stanford Encyclopedia of Philosophy* <<http://plato.stanford.edu/archives/spr2015/entries/perception-contents/>> (accessed 20 august 2015).

physical objects will help to explain what is meant by non-conceptual perception.¹⁹ If someone fails to see an object he is looking for in a drawer, even though the object is in the drawer, in relatively prominent place, but after closing the drawer, recalling its contents, realizes that the object was among them, it seems that there was something like perception going on about the “contents of the drawer”, and even about specifically the object that is been sought, *before the deployment of the concept*.

Can this account of legal perception explain a subject’s ability to identify legally relevant properties in a particular situation *prior to the deployment of the relevant legal reasons*? I believe it can. Its merit is to afford an explanation for how a subject can display a “sensitivity to reasons” without deploying the complete articulation of the relevant reason. A fully articulated legal reason would typically identify all (and only) the answer-driving properties in a particular situation. If those properties can be stored by the inner senses, they can be deployed in sorting the properties of the case even in the absence of the deployment (or even of a conscious articulation) of all the answer-driving properties of the case. Because legal reasoning is a rather complex endeavor, the initial sorting will sometimes overshoot (by selecting as salient a property what is not an answer-driving property) and sometimes it will undershoot (by failing to identify a property that is in fact answer-driving). But the possibility of error in legal perception could hardly count as an objection to the account presented above. In fact, therein resides one of its strengths.

This perception-centred account of the identification of LSPs is not vulnerable to the objection mentioned above that even lawyers who are not remarkably virtuous might be very effective at identifying the relevant LSPs. Nothing in the account above

¹⁹ This example is borrowed from Michael Martin, ‘Perception, Concepts and Memory’ 101 (1992) *The Philosophical Review* 745, at 749. Martin’s example is itself an extension of an example presented by Fred Dretske, *Seeing and Knowing* (Routledge, 1969), 18.

suggests that legal perception can only be developed by those who also possess other aspects of virtue (eg its motivational element). By the same token, this account affords a less onerous explanation of how the capacity to identify LSPs can be developed. Both complex dispositions of character (like virtues) and perceptual frameworks can be modified by experience. But changing the perceptual frameworks that inform the inner senses is less complex than instilling complete virtue. To provide a comprehensive account of the ways in which changes in our perceptual framework occur, in particular in relation to perceiving aspects of complex social and institutional realities, is not a simple task. Such change can only occur if two conditions are met. First, perceptual frameworks (legal or otherwise) develop by *experience*. For this purpose, experience is not limited to sense-experience, but it also includes forms of experience that are not primarily sensorial, such as being exposed to hypotheticals and narratives (both real and fictional).²⁰ Second, one needs to engage with experience in certain ways. The relevant forms of engagement are indicia of the agent possessing intellectual virtues and, conversely, of her not possessing the corresponding intellectual vice of perceptual rigidity.²¹ Perceptual rigidity can manifest itself as an inability to allow experience to influence the gestalts stored in the *imaginatio* and *sense-memory*. As those gestalts accumulate and become progressively more complex they can afford (from a purely functional point of view) to resist further change. This rigidity effectively prevents the agent from improving the ways in which her perception orders the particulars in a number of contexts. Not

²⁰ Martha Nussbaum has argued convincingly that exposure to the complex fictional narrative that is embodied in the modern novel has the potential to enhance a subject's capacity for perceiving aspects of a situation which might have been opaque to her otherwise. See Martha Nussbaum, *Poetic Justice* (Beacon Press, 1995, *passim*; for a summary of the argument see pp. 4-12)

²¹ See Robert Roberts and W. Jay Wood, *Intellectual Virtues* (Clarendon Press, 2007), 202-4.

all change is made impossible, as the rational agent might still perceive the need for further elaboration by the operation of argument.

Perceptual rigidity might also manifest itself as an incapacity to retain the “richness” practical perception. This form of rigidity has a direct and negative impact in the subject’s peripheral legal perception (on which see below). The avoidance of perceptual rigidity is a matter of the agent possessing the relevant intellectual virtues, but a detailed discussion of these virtues here would distract from the main argument.²²

Appropriate engagement with experience is, then, able to change the conceptual frameworks that allow perception to perform its preliminary organizational role. Typically, the kind of experience that might impact on an agent’s legal conceptual framework is the experience of legal cases (often through secondhand narratives), and the form of engagement that is appropriate as a way to improve this framework is legal argumentation, that is, argumentation about whether or not a property or set of properties initially identified within of a particular situation is (are) indeed legally relevant.

3. Peripheral Legal Perception

The account of perception presented so far focused on legal perception’s ability to ‘order’ experience by sorting out the legally salient properties in a particular case. This aspect of practical (and legal) perception is conceptual (as defined above). But not all perception is conceptual. In the last section the thesis that perception should be conceived as ‘rich’ was introduced with regard to sense-perception. The richness of sense perception refers to the possibility that the content of perception exceeds the

²² In article 48 of the *Summa Theologiae* II-II, Aquinas presents a list of eight integral parts of Practical Wisdom (*prudentia*). He also refers to previous attempts to identify integral parts of Practical Wisdom dating back to Aristotle. See Aquinas (n 16) Vol XXXVI.

content that was neatly captured by concepts deployed by the perceiving subject. In Martin's story, presented above, about a subject perceiving the contents of the drawer, the concepts are only deployed after the perceptual experience has ended, that is to say, after the drawer was closed and the cufflinks were not being directly perceived. In that story, perception leaves a trace onto which the conceptual understanding of the presence of the cufflinks in the drawer can latch onto. If there is a trace left from gazing into the drawer, it seems clear that non-conceptual perception was what left that trace. The more general point the story is to illustrate that perception is too rich a phenomenon to be fully captured into conceptual perception. There is no reason to believe that legal properties might not be embedded in the same context of sense-perception richness. It might be that something that was registered by the senses in a way that is pre-conceptual turns out to be a legally salient property. In that sense, 'contractual agreement' is not significantly different from 'cufflinks'. But there is another sense in which the context wherein the perception of LSPs occurs can be said to be rich.

The identification of *legally* salient properties might also be predicated on traces of a different kind. In the normal course of business of a lawyer, she will be faced with relatively large data sets. A client will typically bring to his lawyer copious amounts of information, in a number of different forms (documents, mere allegations, etc); a judge will be presented by the parties with copious information about the situation from which the dispute arose. Those data sets are information-rich in the sense that only part of the information will be incorporated in the legal arguments produced by the subject to find an answer to the legal problem. Some of the information will be deemed by the lawyer to be legally inert in relation to the relevant legal problem. But they would not necessarily be considered legally irrelevant *tout court*. Thus, each case

might leave a *remainder* within the lawyers involved. Those leftovers from previous cases are the stuff from which a subject's peripheral legal perception is formed.

Peripheral legal perception explains an agent's ability to identify a particular property as legally odd (ie as requiring further investigation) even in cases that fall squarely within (or outwith) the available rule. It provokes an irritation in the inner sense's ordering of the sense-data which points towards a possible shortcoming of the subject's legal perceptual framework. As Maksymilian del Mar observed recently, this form of "irritation" of the inner senses has moved so far from sense-perception as to make it an ability of an entirely different kind.²³ Yet, it is still a way to move the decision-maker beyond the available frames of reference (ie, the property sets that have been learned *qua* legally relevant and incorporated by the inner senses as such). Now, if this rough picture of legal perception is correct, some light is shed on how subjectivity can operate productively in contexts of legal decision-making and, in particular, on how one can "creatively break the law".²⁴

So here is the resulting picture of how legal perception develops. An experienced lawyer, who engages appropriately with her experience, develops a complex framework of gestalts through which her inner senses organize the world. Those gestalts are formed as the answer-driving properties that were incorporated into successful legal arguments in previous cases accumulate in the *imaginatio* and in the sense-memory. The answer-driving properties are the properties in previous cases that attracted the relevant legal rules to resolve the legal dispute in that case. Such answer-driving properties, however, are always drawn from a much more complex set of properties belonging to each case. So in each case the lawyer would have learned both

²³ Maks Del Mar, 'Judging Virtuously: Developing an Empathic Capacity for Perceptual Sensitivity' 5(1) (2014) *Jurisprudence*, 177.

²⁴ Zenon Bankowski, *Living Lawfully* (Kluwer, 2001), 77-78.

about properties that are immediately legally relevant and about properties that are not immediately legally relevant. So the lawyers experience will also generate a peripheral legal perception inhabited by properties that were not explicitly learned *qua* legally relevant, but might turn out to be so.

4. Perception and Lawfulness

As we saw in section one, an advantage of locating the initial selection of LSPs in perception is that an account of the development of perception can be informative without reference to a complete theory of a virtuous character or even to a complete theory of a particular virtue. Virtues are complex combinations of subjective traits, which comprise not only perception, but also *inter alia*, dispositions to act (ie to react to perceptions and/or reasons) and emotional responses. A perception-centred explanation of the capacity for initial selection of legal properties offers a more frugal, albeit sufficient, account of the phenomenon. The perception account's frugality, however, is compatible with considering the capacity for appropriate initial property selection as either (i) an integral part of a virtue or as (ii) a subjective trait external to that virtue (albeit perhaps instrumentally related to it).

Here we must tread carefully. There are two different ways in which a subjective trait can be said to be part of a virtue. On the one hand, the possession of a certain subjective trait *S* by one particular individual *a* can be said to be a necessary condition for the possession of the relevant virtue (say lawfulness). On the other hand, the possession of *S* by *a* might be said to be predicated on *a* also possessing all other traits that constitute that virtue. Affirming the first kind of relationship between subjective trait and lawfulness is to say something about the *concept* of lawfulness and it answers to the question of whether it is possible for anyone to be lawful without

possessing *S*. Affirming the second kind of relationship is to say something about the conditions under which *S* can be developed, namely, that it is not possible to develop *S* in the absence of the remaining elements of lawfulness.²⁵

Importantly, it is possible to claim that the relevant subjective trait (in our argument, the initial perception of LSPs) is an integral part of the concept of lawfulness in the first sense (as a necessary condition for the possession of the virtue), and yet its possession might not be predicated on the possession of other aspects of lawfulness.

Denying that *S* is internal to lawfulness in the first (conceptual) sense or in the second (developmental) sense leaves open the question of which other kind(s) of relationship could there be between *S* and lawfulness.

If it does not depend on the possession of complete lawfulness, the capacity to perceive LSPs accurately could still be a useful skill that a lawful person would do well to possess, much like excellence in the craft of braiding reins for horses might help the courageous rider in a battlefield (while not requiring the possession of courage for its development). But braiding reins (i) is not an integral part of courage and (ii) it might serve a purpose that bears no relationship with courage. Many a modern lawyer would be comfortable with an account of her abilities to interpret and help to enforce the law (including the capacity for initial perception of LSPs) as skills which are not necessarily connected to any moral virtues she might possess, including lawfulness. In fact, the way in which contemporary lawyers deal with positive law appears to be closer to the way a craftsman deal with their trade instruments. Law's

²⁵ To this second question different kinds of answers can be given. First, arguments might be put forward in support of a conceptual connection between *S* and other aspects of lawfulness so that the development of *S* cannot happen in the absence of one or more of the remaining elements of lawfulness. But it might also be that there are empirical reasons why the development of *S* in subject *I* cannot happen (or is less likely to happen) if *I* does not possess at least some other subjective elements of lawfulness.

instrumental value²⁶ (as opposed to its value *as such*) has been often commemorated and also taken for granted, and legal experts have been both praised and vilified for their ‘craftsmanship’. Contemporary lawyers seem to be closer to other Aristotelian ‘craftsmen’, as even the actions of the well-meaning lawyer appear to be justifiable only by the external ends they serve. Accordingly, those who are in charge of implementing the law are frequently seen as specialists on choosing the right *means* to achieve ends which are only contingently connected them (hence MacIntyre’s grumpiness with the modern lawyer).

If, however, the capacity to identify LSPs through legal perception is not considered to be a skill only contingently (if sometimes productively) connected to lawfulness, but instead is taken to be integral part of the virtue, other kinds of questions arise regarding the ways in which it relates to the remaining aspects of lawfulness and, more generally, to other virtues, including practical wisdom. These questions are acutely pressing for those who accept contemporary defenses of the doctrine according to which all virtues form a unity. At its most basic, the doctrine of the Unity of Virtues (UV) simply states that it is not possible that an agent would have already acquired one of the character virtues without having acquired all the other character virtues.²⁷ According to UV, the virtues are said to imply one another and form a unity and that unity is brought about by practical wisdom. Thus put, UV might appear implausible, as it is at odds with the very common experience of knowing

²⁶ Although Brian Tamanaha (in *Law as a Means to an End* (Cambridge, 2006), chapters 1-4 and *passim*) has written against conceptions of law as a means to an end, Leslie Green rightly argues that his complaint is not so much about law’s instrumentality, but about using law to pursue certain valueless ends and points out that there seem to be a relatively broad consensus about law’s instrumentality (see, Leslie Green, ‘Law as a Means’ In Peter Cane (ed) *The Hart-Fuller Debate in the 21st Century* (Hart Publishing, 2010), 169-188, esp 171-173).

²⁷ As Aristotle put it in the *Nichomachean Ethics*, at 1144b33-35.

people who appear to have developed virtues unevenly.²⁸ It is not uncommon to know people who are brave, but not very generous, or who are just, but cowardly when faced with certain kinds of danger. In fact, that apparent implausibility is at the root of some contemporary objections to the UV. Those objections, however, are only a challenge for one of two very different possible readings of UV. As Russell put it:

The thesis that phronesis entails all the virtues could be the thesis that, *for any agent*, that agent can have phronesis only if that agent also has all the virtues; or it could be the thesis that *any theoretical model* of phronesis must also be a model of all the virtues.²⁹

The empirical observation that different virtues (and different elements of a single virtue) might develop at different pace in different individuals is only a challenge for the first reading of UV. Typically, the kind of challenge faced by the second reading would be either a defense of an alternative theoretical model in which each virtue can be fully realized independently of other virtues³⁰ or, more radically, a defense of an alternative theoretical model in which the full realization of one virtue *conflicts* with the full realization of another virtue.

As Russell has remarked, the plausibility of either challenge relies on a conception of virtue as a subjective disposition to act in a certain way when the agent finds herself in certain typical situations. A brave person's decision would typically not be swayed by her fears, when facing danger. A temperate person would not eat excessively, even when presented with a wonderful banquet. In this view of the virtues, they each possess a sphere of concern that is insulated from the spheres of concern of other virtues. If virtue is conceived in this way, learning the sphere of concern of one virtue

²⁸ A point acknowledged by many a defender of UV. See *inter alia*, Julia Annas, *Intelligent Virtue* (Oxford University Press, 2011), 83 and Daniel Russell, *Practical Intelligence and the Virtues* (Oxford University Press, 2009), 336-7.

²⁹ Russell (n 29) 337.

³⁰ See Walker 'Virtue and Character' 64 (1989) *Philosophia*, 350-1.

and developing a disposition to act in a particular way within its proper sphere would not imply the need to know the sphere of concern of another virtue and develop the appropriate dispositions. Moreover, there would be no reason to believe that two virtue spheres could not overlap and, at least in some occasions, pull in opposite directions. If virtues are conceived in this way, it is difficult to see how UV could be justified (at least in the absence of further argument).

But virtues are not simply dispositions to act in certain ways in typical contexts. It is not enough that certain actions are performed by the subject in those contexts: they must be performed *for the relevant reasons*. As John M Cooper put it:

“...in order to have the knowledge necessary for any full virtue, one will have to appreciate fully and be moved by all the good reasons there are in support of all sorts of virtuous reaction to things and events there are...”³¹

Thus acting from a virtue is not something that can be done by *mere* habit or compulsion. In acting from a virtue, one must be acting for reasons.³² That is the crux of Aristotle’s suggestion that the virtues are intrinsically connected through practical wisdom, an insight that has been further developed by contemporary virtue theory.³³ As Daniel Russell has put the difference between the two conceptions of virtue: while virtues conceived as discrete dispositions to act well in certain contexts provide “trajectories”, virtues as excellences provide “direction”.³⁴ In the ‘trajectories’ view, possessing a virtue is simply a matter of continuing to do more or less the same thing one learned to do in relevantly similar contexts. In the ‘direction’ conception of virtue, what the virtue produces is an inclination towards performing the action that is

³¹ John Cooper, ‘The Unity of Virtue’ 15(1) *Social Philosophy and Policy* (1998) 233, at 272.

³² Russell (n 29) 344

³³ Aristotle suggests it at Nichomachean Ethics, 1144b1-1145a11, and the thesis is defended, among others, by John McDowell ‘Virtue and Reason’ in Roger Crisp and Michael Slote (eds), *Virtue Ethics* (OUP, 1997), 141-162, at 142; Rosalind Hursthouse, *On Virtue Ethics* (OUP, 1999), 153; Annas (n 29) 83-99; and Russell (n 29) 335-373.

³⁴ Russell (n 29) 339-348.

required *by the correct appreciation of the reasons which underlie the virtues bearing on the situation.*³⁵ The correct appreciation of the reasons will sometimes explain that

the actions which would be normally performed by habit need to be avoided, as other reasons, learned in different contexts, should control the action in the instant case.

Practical wisdom is the intellectual virtue that allows one to identify in an instant case the reasons that justify the actions a virtuous agent is inclined to perform in certain virtues-specific contexts. It is fidelity to those underlying reasons that ultimately constitutes virtue, and it is the possibility of deliberating about what those reasons require in the instant case that makes practical wisdom the touchstone of all virtue.

However, in relation to lawfulness, practical wisdom would not be able to identify the actions required without engaging with the LSPs within the situation at hand and that, in turn, would suggest that the initial selection of LSPs is an ability that is not only an integral part of lawfulness, but an integral part of practical wisdom.

The perception-centred account of initial identification of LSPs in legal argumentation is not meant to be incompatible with a virtue theoretical account of that ability. It simply provides a more frugal account of the phenomenon that frames further research on how positive law and legal argumentation interact with virtues.

The lion's share of the work, however, is yet to be done.

³⁵ *ibid*, 341.